Supreme Court, U.S.
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No. 02-71

In The

Supreme Court of the United States

1-800-FLOWERS.COM, INCORPORATED,
FRESH INTELLECTUAL PROPERTIES,
INCORPORATED, AND
800-FLOWERS, INCORPORATED,

Petitioners,

v.

CURTIS P. JAHN AND
CAPITOL WAREHOUSING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EARL H. MUNSON
Counsel of Record
CATHERINE M. ROTTIER
BOARDMAN, SUHR, CURRY
& FIELD LLP
1 South Pinckney Street, Suite 410
P.O. Box 927
Madison, Wisconsin 53701-0927
(608) 257-9521
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does an FCC public policy to prevent hoarding of a scarce supply of toll-free telephone numbers have any bearing on the enforcement of the private contract at issue in this case?

2. If a 1997 FCC regulation is used to impair contractual obligations arising from private transactions legally entered into in the 1980's, are the rules against retroactive agency action violated?

RULE 29.6 NOTATION

Capitol Warehousing Corporation is privately held and no publicly-held company owns stock in the corporation.

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ADDITIONAL REGULATION INVOLVED

47 C.F.R. §52.101: General Definitions.

As used in this part:

(a) *Number Administration and Service Center ("NASC").* The entity that provides user support for the Service Management System database and administers the Service Management System database on a day-to-day basis.

(b) *Responsible Organization ("RespOrg").* The entity chosen by a toll free subscriber to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber.

(c) *Service Control Points.* The regional databases in the toll free network.

(d) *Service Management System Database ("SMS Database").* The administrative database system for toll free numbers. The Service Management System is a computer system that enables Responsible Organizations to enter and amend the data about toll free numbers within their control. The Service Management System shares this information with the Service Control Points. The entire system is the SMS database.

(e) *Toll Free Subscriber.* The entity that requests a Responsible Organization to reserve a toll free number from the SMS database.

(f) *Toll Free Number.* A telephone number for which the toll charges for completed calls are paid by the toll free subscriber. The toll free subscriber's specific

geographic location has no bearing on what toll free number it can obtain from the SMS database.

REASONS FOR DENYING THE WRIT

There are no compelling reasons to grant the writ and there are several reasons to deny it. First, the unique background of this private contract action makes this case inappropriate for certiorari review. Second, petitioners' invocation of public policy to avoid their valid contractual obligations is completely unpersuasive because the FCC policy has nothing to do with the contract at issue here. Third, petitioners did not raise the issue of primary versus secondary retroactivity on which they now predicate their request for a writ until they filed a petition for rehearing in the Seventh Circuit. Therefore, petitioners have not adequately preserved the issue for further review. Fourth, petitioners have not shown that the decision of the Seventh Circuit Court of Appeals conflicts with the decision of another Court of Appeals on "the same important matter." *See* Rule 10(a) of the Rules of the Supreme Court of the United States. Finally, petitioners err in arguing that a 1997 FCC regulation can be used to impair contractual obligations arising from private transactions legally entered into in the 1980's. Nothing in the language of the regulation suggests that the FCC intended that result, and use of the 1997 regulation in such a way would constitute impermissible retroactive agency action. Accordingly, the petition for a writ should be denied.

I. THE UNIQUE BACKGROUND OF THIS CASE MAKES IT INAPPROPRIATE FOR CERTIORARI REVIEW.

AT&T, then a legal monopoly as the sole provider of long distance telephone service, began to offer Wide Area Telecommunications Services ("WATS") in the early sixties. WATS permits a subscriber to pay a fixed charge rather than a charge assessed for each call. In order to protect its monopoly power, early AT&T tariffs prohibited subscribers from reselling or sharing WATS, since, if a subscriber did so, the practice would undermine AT&T's legal monopoly. The FCC became concerned that AT&T's prohibition of resale and sharing of WATS resulted in segmented markets and promoted harmful price discrimination. For that reason, the FCC, on December 18, 1980, ordered that tariff restrictions on resale and sharing of WATS were thereafter unlawful. *See, National Ass'n of Regulatory Util. Com'rs v. F.C.C.*, 746 F.2d 1492, 1495-1497 (D.C. Cir. 1984); *Resale and Shared Use*, 83 F.C.C.2d 167 (1980). By making tariff restrictions on resale unlawful, the FCC, in 1980, actually encouraged the sale of WATS by subscribers.

In 1967, AT&T, still a monopoly, began providing toll-free service permitting subscribers to pay in advance for all calls made to them. From 1967 to 1996, 1-800 was the only prefix available for toll-free service.

In 1977, AT&T assigned WATS toll-free No. 1-800-356-9377 to Madison Truck Brokers. In May, 1982, the number was assigned to 1-800-FLOWERS, Inc. (Wis.), a corporation controlled by respondent Curtis Jahn. That summer, Jahn and others test-marketed the 1-800-FLOWERS concept of selling floral products by telephone. In October, 1982, Jahn transferred control of the corporation to William Alexander pursuant to an agreement among four

individuals, including Alexander and Jahn, to market floral products using the 1-800-FLOWERS concept. Of the several agreements signed by the four parties, one contract gave Jahn a 1% royalty on all operating profits of the business, recognizing in part his earlier transfer of the number to the corporation. In 1986, the royalty agreement was modified at the request of the petitioners to 1% of net sales accomplished over the phone number. Royalty payments were made pursuant to the contract for many years before respondents discovered that petitioners breached the contract by failing to make full payment. After this lawsuit was filed to enforce the contract, petitioners for the first time asserted the contract violated public policy and was unenforceable. In making that argument, petitioners mischaracterize the public policy on which they claim reliance. That public policy is revealed by the history behind the enactment of 47 C.F.R. §52.107.

In 1995, the Federal Communications Commission (FCC) was advised by the telecommunication industry that the pool of available 800 numbers was rapidly declining. The FCC decided that rulemaking was necessary to promote the "efficient, fair and orderly allocation, and use of, these limited numbering resources." *Toll Free Service Access Codes, Notice of Proposed Rulemaking*, CC Docket No. 95-155, FCC No. 95-419, ¶¶1-10 (10/5/95).

After two years of hearings and comment, the FCC adopted regulations including 47 C.F.R. §52.107(a). When it did so, it repeated its rationale for the regulation; that is, to address the rapid and unanticipated depletion of 800 numbers. *Second Report & Order and Further Notice of Proposed Rulemaking, In the Matter of Toll-Free Service Access Codes*, CC Docket No. 95-155, 12 FCC Rcd 11, 162, at ¶¶1, 16 (4/11/97). The FCC determined that its statutory

authority required it to "ensure the efficient, fair and orderly *allocation* of toll free numbers." Second Order ¶18. (Emphasis added.) The Commission did *not* conclude that it intended to outlaw payments required by prior valid contracts, such as the one between petitioners and respondents, or that an attempt to invalidate such contracts would advance the Commission's allocation policy. Instead, the Commission wrote:

> We further find that number brokering, which is the selling of numbers by private entities for a fee, is not in the public interest. Brokering provides motivation for hoarding and therefore results in quicker exhaustion of the current SAC [Service Access Code such as 800, 888] and interferes with the orderly allocation of numbering resources.

Second Order, ¶38. Thus, the FCC's goal in enacting the regulation was to prevent hoarding and its public policy was to thereafter promote the fair, orderly and efficient allocation of toll-free numbers.

II. PETITIONERS' PUBLIC POLICY ARGUMENT IS WITHOUT MERIT.

The public policy of promoting the fair, orderly and efficient allocation of toll-free numbers is not implicated at all by the private contract between petitioners and respondents. The payments required by the 1982 transaction do not accelerate the depletion of toll-free numbers. The 1-800-FLOWERS number has always been used for a legitimate business interest. A refusal to enforce the contract in 2002 or any future time will have nothing to do with the orderly allocation of scarce resources. Petitioners ignore

these obvious facts in urging that public policy relieves them of their contractual obligations.

The conduct of petitioner, 1-800-FLOWERS.COM, Inc., is proof that the purpose and intent of the FCC regulation had nothing to do with the royalty agreement. This entity is a sophisticated user of more than ten toll-free vanity numbers. It filed comments with the FCC before the 1997 regulation was enacted. After the 1997 enactment, 1-800-FLOWERS.COM, Inc. continued to pay the royalty required by the contract involved in this case, because it was obvious the payments had nothing to do with the purpose and intent of the administrative rule expressed in §52.107. Only after being sued did petitioners look for an issue to avoid liability for their contractual obligations. This is not the sort of claim that warrants certiorari review.

III. CERTIORARI REVIEW IS INAPPROPRIATE BECAUSE PETITIONERS DID NOT DEVELOP AN ADEQUATE RECORD BELOW ON THE PRIMARY VERSUS SECONDARY RETROACTIVITY ISSUE ON WHICH THEY PREDICATE THEIR REQUEST FOR A WRIT.

Petitioners did not raise the primary versus secondary retroactivity argument for consideration by the Seventh Circuit Court of Appeals until they petitioned for a panel rehearing after the Court's opinion was issued. Even though respondents cited and relied on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), in their appellate brief, petitioners did not discuss either *Landgraf* or *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), in their response brief to the Seventh Circuit. Petitioners now seek Supreme Court review without the benefit of full

briefs by the parties in the lower courts on the very issue presented and without the benefit of an analysis of the issue by either of the lower courts that have issued decisions in this case.

IV. PETITIONERS HAVE NOT SHOWN A CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER COURTS OF APPEALS ON "THE SAME IMPORTANT MATTER."

With very little analysis, petitioners leap to the conclusion that the decision below conflicts with decisions issued by other circuits. Their argument that a split of authority exists on the secondary retroactivity issue is poorly developed and ill-conceived. Indeed, petitioners have not shown that the D.C. and Ninth Circuits, relying on their own precedents, would have decided this case any differently than the Seventh Circuit did. The mere mention of secondary retroactivity in some cases but not another surely does not mean that the cases conflict.

Viewed from that perspective, petitioners' purpose in citing *Federal Deposit Ins. Corp. v. D.L. Faulkner*, 991 F.2d 262, 266 (5th Cir. 1993), *Bergerco Canada v. U.S. Treasury Dept.*, 129 F.3d 189, 192 (D.C. Cir. 1997), and *Direct TV, Inc. v. Federal Communications Comm.*, 110 F.3d 816 (D.C. Cir. 1997), is obscure, since those cases do little more than mention secondary retroactivity. None of these decisions uses the principle of secondary retroactivity to invalidate payments required by a private contract entered into before the regulation or statute at issue was first effective. Indeed, none of the cases petitioners cite involve the invalidation of a pre-existing contractual arrangement by later legislation or rulemaking. That is probably because

such cases are extraordinarily rare. As this Court observed eight years ago in *Landgraf*, 511 U.S. at 271:

> The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.

In his concurrence in *Landgraf*, just as in his concurrence six years earlier in *Bowen*, 488 U.S. 204 (1988), Justice Scalia agreed with his brethren that retroactive legislation is looked upon with disfavor. *Bowen*, 488 U.S. at 223; *Landgraf*, 511 U.S. at 286. According to Justice Scalia, the critical issue in the retroactivity analysis is identifying the relevant activity the rule in question seeks to regulate. *Landgraf*, 511 U.S. at 291 (Scalia, J. concurring). Here, 47 C.F.R. §52.107(a) was aimed at protecting a scarce resource by preventing hoarding of that resource. Absent a clear statement to the contrary, only such relevant activity which occurs after the effective date of the regulation is covered by it. *Id.* This means that selling toll free numbers after 1997 is proscribed, but the sale of such numbers before then is unaffected by the rule.

This result obtains even if Justice Scalia's discussion of secondary retroactivity is applied. As he explained:

> A focus on the relevant retroactivity event also explains why the presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions – so-called secondary retroactivity. [Citations omitted.] A new ban on gambling applies to existing casinos and casinos under construction [citations omitted], even though it "attaches a new

> disability" to those past investments. The relevant retroactivity event is the primary activity of gambling, not the primary activity of constructing casinos.

Landgraf, 511 U.S. at 293, n. 3 (Scalia J., concurring). Here, the relevant retroactivity event is the primary activity of hoarding. Because that is the primary conduct being regulated, the rules against retroactive legislation would be violated if the 1997 proscription on selling could be applied retroactively to invalidate the consideration agreed upon in the 1980's for the sale of a business that included transfer of the valuable toll-free number 1-800-FLOWERS.

V. USE OF THE 1997 FCC REGULATION TO IMPAIR CONTRACTUAL OBLIGATIONS ARISING FROM PRIVATE TRANSACTIONS LEGALLY ENTERED INTO IN THE 1980'S WOULD VIOLATE THE RULES AGAINST RETROACTIVE AGENCY ACTION.

A fatal flaw in petitioners' case is the absence of any language in §52.107(1) purporting to change future consequences of past events. The Seventh Circuit held that "§52.107 does not purport to affect transactions entered into before 1997." App. 8a. Nothing in the regulation outlaws future periodic payments calculated to satisfy contractual obligations entered into before 1997. As stated by the Seventh Circuit, " . . . nothing in §52.107 speaks to payment; . . . . " App. 9a. Indeed, petitioners do not suggest that the transfer in 1982 of the valuable phone number 1-800-FLOWERS should be rescinded based on the 1997 FCC regulation. Rather, they argue only that their obligation to pay what they agreed to pay for that transfer should be erased. In short, they seek to retain all the

enormous benefits of the transfer without paying the agreed upon consideration.

Use of the 1997 regulation to absolve petitioners of their contractual obligations would be particularly unjust because the respondents were never subject to the regulation in the first place. A careful reading of §52.107, including the definitional sections, establishes that the regulation does not purport to regulate respondents. In 1982 and 1986, when the underlying contracts were executed, there was no "SMS Database" and there were no "Responsible Organizations" as defined by the FCC regulation. Jahn and Capitol were not "toll free subscribers" within the meaning of §52.107(a)(1). *See* 47 C.F.R. §52.101(b)(d) and (e). Nor could Jahn and Capitol be considered "toll free subscribers" today. Their use of the 1-800-FLOWERS number ceased in 1982, and they are not today asking to reserve this number from the SMS database. Jahn and Capitol are not now subject to FCC regulation and they have not been subject to FCC regulation since 1982. 1-800-FLOWERS.COM, of course, was a subscriber in 1997 and is now. But subsection (1) of §52.107(a) *does not* apply to buyers. Subsection (2) *does* apply to buyers, but the parties agree that the number was not acquired by 1-800-FLOWERS.COM "for the purpose of selling it to another" for a fee, so that subsection is inapplicable too. Thus, neither party to the underlying contract is subject to §52.107(a)(1) and enforcement of the contract could not possibly violate that section.

The language of §52.107 unequivocally establishes that the regulation was not intended to alter future payments based on a 1982 transaction. The regulation was narrowly and technically defined to govern only those

persons who might interfere with the "efficient, fair and orderly allocation of toll-free numbers" after 1997.

We know the FCC did not intend to regulate payments on old contracts because §52.107 was created to control the future allocation of a scarce resource. Despite that frequently-stated purpose, petitioners argue that the regulation should be construed to prevent future payments on old contracts, because, if the 1982 transaction had occurred in 1997, it would have violated the regulation. That is not true either, but, even if it were, petitioners' argument is untenable. In effect, petitioners suggest that whenever a regulation prospectively changes the legality of prior legal contracts, any performance required by the previously valid contract – such as periodic payments – is thereafter illegal even though the agency did not intend that result. That argument is an exercise in retroactivity; more importantly, it does not make sense.

Petitioners attempt to justify this result by relying on the doctrine of secondary retroactivity. Their reliance is misplaced. As the Seventh Circuit correctly observed:

> Federal regulations do not, indeed cannot, apply retroactively unless Congress has authorized that step explicitly. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). No statute authorizes the FCC to adopt regulations with retroactive effect, and §52.107 does not purport to affect transactions entered into before 1997.

App. 8a.

In *Landgraf*, 511 U.S. at 269, this Court adopted Justice Story's definition of retroactivity:

> "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ."

Id., citing *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (1814). Under that definition, use of the 1997 FCC regulation to foreclose future periodic payments on a sale that predated the regulation impairs vested rights and constitutes retroactive legislation.

In *Landgraf*, Justice Scalia objected to the majority's definition of retroactivity. *Landgraf*, 511 U.S. at 290. Six years earlier, in *Bowen*, 488 U.S. 204, Justice Scalia had pointed out the difference between retroactivity for a statute passed by Congress and retroactivity for an administrative regulation. He noted that Congress has the power to enact a statute with retroactive effect, but only if Congress does so expressly and only if retroactivity is reasonable.

The ability of a regulatory agency to enact retroactive rules and codes is different. Such an agency is generally precluded from enacting retroactive regulation under the Administrative Procedures Act unless Congress specifically gives such authority to the agency. *Bowen*, 488 U.S. 233-24. Congress gave no such authority to the Federal Communications Commission.

From those predicates, Judge Scalia argues that agency action may not alter past legal consequences, but may alter the future effects of past actions if it is reasonable for the agency to do so. *Bowen*, 488 U.S. at 224. In determining whether or not a rule alters past legal consequences, Justice Scalia suggests that a court examine "the relevant activity that the rule regulates." *Landgraf*, 511

U.S. at 291. In §52.107, the FCC did not seek to regulate future payments based on past contracts. Rather, it exercised its power over certain specifically defined future sales transactions in an effort to prevent future hoarding. To invalidate future payments mandated by a 1982 agreement is to engage in retroactive agency action. The end result would be the application of a 1997 FCC rule to invalidate a 1982 transaction that was perfectly valid when made.

For petitioners' argument on secondary retroactivity to have any merit, petitioners would also have to establish that the secondary retroactivity they seek is reasonable. That is because, as Justice Scalia explained in his *Bowen* concurrence, "[a] rule that has unreasonable secondary retroactivity – for example, altering future regulations in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule – may for that reason be 'arbitrary' or 'capricious'. . . and thus invalid." *Bowen*, 488 U.S. at 220. Petitioners make no showing that retroactive application of §52.107 to allow them to evade their future contractual obligations from a 1982 contract satisfies any index of reasonableness.

On its face, a declaration that §52.107 prohibits payments based on a pre-1997 contract is unreasonable because such a declaration bears no relationship whatsoever to the unambiguous purpose of the FCC in an enacting the regulations. "[T]he inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied" in the regulation. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961). The FCC's public policy embodied in the regulation is to protect a scarce resource after 1997. It has nothing to do with petitioners' contractual

duty to make royalty payments they agreed to make when they accepted transfer of the valuable 1-800-FLOWERS number from respondents in 1982.

CONCLUSION

Petitioners have not articulated any compelling reason to justify discretionary review by this Court. Accordingly, respondents respectfully urge the Court to deny petitioners' petition for writ of certiorari.

Respectfully submitted,

EARL H. MUNSON
Counsel of Record
CATHERINE M. ROTTIER
BOARDMAN, SUHR, CURRY & FIELD LLP
1 South Pinckney Street, Suite 410
P.O. Box 927
Madison, Wisconsin 53701-0927
(608) 257-9521
Counsel for Respondents